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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 42

W. J. MEREDITH, JAMES G. MARTIN and A. R. OHMART,

Petitioners

vs.

THE CITY OF WINTER HAVEN, a municipal corporation, et al.,

Respondents

BRIEF OF RESPONDENTS

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TABLE OF CASES

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BRIEF OF RESPONDENTS

Petitioners, holders of bonds of the City of Winter Haven, brought this suit against the City for a Declaratory Judgment and an Injunction to make that Judgment effective. The District Court dismissed the Complaint without opinion (p. 100 Tr.). The Circuit Court of Appeals held that the dismissal should be without prejudice to Petitioners' right to institute a suit in the State Court to obtain a determination of their rights, 134 Fed. (2d), 202

Restatement of the Case

Because Petitioners' "Statement of the Case" omits many important facts and rests upon premises not supported by allegations in the Complaint, a restatement is necessary.

The primary object of the complaint is a declaration that certain provisions of Petitioners' bonds are valid. Another bondholder of the City in 1941, one Andrews, instituted a suit in the State Court to obtain a declaration of the validity of the same provisions of other bonds of the same issue as those of Petitioners. The Florida Supreme Court held that they were unenforcible, could be severed from the other provisions of the bonds, that the bonds could be called by the City at par plus accrued interest to date of redemption, and dismissed the suit. *Andrews* vs. *Winter Haven* 148 Fla. 144, 3 So. (2d) 805. The decision cites and approves earlier decisions by that Court, *Outman* vs. *Cone*, 141 Fla. 196, 192 So. 611, *Taylor* vs. *Williams*, 142 Fla. 402, 195 So. 175. See also-*State* vs. *Special Tax School Dist.*, 107 Fla. 93, 144 So. 356.

Petitioners admit that if the Federal Court must follow these decisions, their prayer must be denied. But they say that since these decisions were rendered after the bonds were issued, this case should be decided in accordance with *Sullivan* vs. *Tampa*, 101 Fla. 298, 134 So. 211, a case decided by the Florida Court before their bonds were issued, because of a so-called "principle of reliance" or "contract exception" recognized by this Court in *Gelpcke* vs. *Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520, which they say has not been reversed by *Erie* vs. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, or by any case subsequent thereto. Petitioners have not alleged that they knew of the opinion in *Sullivan* vs. *Tampa*, supra, or that they relied upon it, or that they acquired their bonds before the Florida Court decided the *Outman* and other cases.

Since decision of this case requires a construction of Chap. 15772 Laws of Florida, 1931, and of Sec. 6, Art. IX of the Constitution of Florida and their effect upon the bond contract; this Court should follow the decision of the

Florida Court in *Andrews vs. Winter Haven*, supra, which involved the identical issue:

Sec. 6, Art. IX of the Constitution of Florida was amended in 1930 after the collapse of the Florida real estate boom, and as amended, reads as follows:

> "The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, and the counties, districts or municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such counties, districts, or municipalities shall participate, to be held in the manner to be prescribed by law, but the provisions of this law shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such counties, districts or municipalities."

The reasons for the adoption of the amendment and the purposes of the amendment were stated by the Florida Court in *Sullivan* vs. *Tampa*, supra, as follows:

> "It is a matter of common knowledge in this State that prior to the adoption of the amendment, and especially during the boom period marking the years 1924 to 1926, the counties, districts and municipalities of the state had issued bonds, notes, and other obligations involving hundreds of millions of dollars; that the issuance of a large part of these obligations *had been authorized without a vote of the people, or in many cases, when a vote had been had a very small portion of the voters had actually participated in the election.* After the collapse of the boom and the return to a more sane condition of the public mind there arose a strong sentiment among our people that no further bonded

indebtedness should be issued or incurred *without first securing the approval of a majority of the votes of the people upon whom the burden would fall. But existence of the large amount* of outstanding obligations, many of which had matured, or were about to mature, rendered it necessary that some provision should be made which would authorize the refunding of these existing and maturing obligations without the expense and delay of preliminary election, otherwise immediate defaults would in many cases have occurred before the machinery for holding an election could have been put in motion and its function completed. Such conditions must have been in the minds of the framers in proposing, and of the people in adopting, such amendment. May it not be said that the intent of the people was *to prevent further abuse of the power to issue new and additional obligations, while at the same time facilitating the refunding of existing obligations already outstanding?* Such obligations were not to be repudiated; they had to be paid or refunded. *While the main evil sought to be prevented or remedied by the amendment was the further increase of the bonded indebtedness of the several counties, municipalities, and districts of the state except upon the authority of the people expressed in an election,* it was also necessary that provision be made for authorizing the refunding of existing obligations, and even 'the interest thereon'."

The greatest increase in Florida municipal debt occurred in cities of the peninsula section of the State. The City of Winter Haven was no exception. With a population of 7130 in 1930, its total debt in 1931 exceeded two million dollars,—nearly $300. per capita against a national average of less than $80. per capita for cities of less than 100,000 population. The annual interest rates upon its debt were 6% and 5½% (pp. 50-57 and 64-65) amounting to nearly $120,000 per year. $150,000. to $200,000. of principal was maturing each year. Prior to 1931, the City had been able

to pay its interest, but met its maturing bonds after 1927 only by the issue of "Capital Fund", "Funding" and "Refunding" bonds totaling over $1,000,000. (the schedules of bonds outstanding in 1933 (pp. 28-49 Tr.) show that the number of bonds of the original issues that had been retired was substantially equal to the amount of such bonds issued after 1927).

In 1931, the City defaulted in payment of interest and also on its maturing bonds. By 1933, unpaid interest and principal amounted to nearly $600,000. Another $227,000. principal would mature in 1934. (pp. 29 to 49 Tr.) Only those who lived in Florida during the era of municipal defaults can realize the effect of such a general default upon local government and upon taxpayers.

In May 1933, R. E. Crummer and G. W. Simons submitted to the City a proposal to refund the entire debt of the City (pp. 119-135 Tr.)—past due bonds not only, but also bonds not due, and all past due interest—into new refunding bonds of two series to be exchanged for the outstanding debt. Their proposal was accepted by the City. The contract was similar to the one between R. E. Crummer & Company and Lake County, which the Florida Court held void in *Taglor vs. Williams*, supra; and to that of Nuveen & Company with Bradford County, which the Fifth Circuit Court of Appeals held void in 133 Fed. (2d) 169. Petitioners claim to be the owners of bonds issued under that void agreement.

Bonds of Series A were exchanged for bonds bearing 6%; bonds of Series B, for bonds bearing 5½%. The rate of interest on all new bonds was fixed at 3½% for two years, 4% for one year, 4½% for one year, and 5% for six years; after which Series A would return to 6% until maturity, and Series B to 5½%.

The bonds provided that if they

"shall not have been called and retired as hereinafter

provided prior to maturity the full interest at the rate of six percent per annum less the amount theretofore paid from the date hereof to said maturity date shall also *at that time be enforcible, collectible and paid upon presentation and surrender of said bond.*"

Secs. 2 and 7 of the Resolution (pp. 50 and 66 Tr.) authorizing issue of the bonds repeat this in slightly different phraseology:

> "If any of said bonds shall not have been called and retired as hereinafter provided prior to maturity full interest at the rate of 6 percent (or 5½ percent) per annum less the interest theretofore paid in accordance with such interest coupons, shall also *on such maturity date be enforcible, collectible and paid upon presentation of said bonds as hereinafter provided*, which said deferred interest shall be represented by a non-interest bearing non-detachable certificate or coupon attached to each of said bonds."

The wording of the non-detachable deferred interest certificate is as follows:

"No..... $.....

> On the first day of ....19....., the City of Winter Haven, Polk County, Florida, will pay to bearer at the Central Hanover Bank and Trust Company of New York City, in the City of New York, New York, the sum of.....Dollars, being the *then enforcible, collectible and deferred interest* on its City of Winter Haven General Refunding Bond Issue of

1933, Series "A" Dated April 1, 1933 No.....
unless said bond shall have been heretofore called for redemption.

.....
Mayor Commissioner City of
Winter Haven, Florida.

.....
City Auditor and Clerk
City of Winter Haven, Fla."

The face amount of the "deferred interest certificate" attached to each $1,000. bond of Series A is $145.00; of Series B, $95.00. No bonds of either series will mature until 1948, after which they mature serially through 1963; hence the deferred interest would not become due until the bonds are due.

The City contracted to make annual tax levies of not less than $105,000. to $120,000. per year (p. 125 Tr.) but in fixing the millage after the first year, it would assume that collection for the next year would be at the rate of the previous year and it would adjust the millage accordingly. From the sixth to the tenth year (1939 to 1943) the City agreed to also add to the annual levy an amount equal to one-fifth of the taxes it had failed to collect during the preceding five years. No reductions could be made in the annual tax levies until a part of the principal had been retired nor until after five years had elapsed. The contract (p. 126) anticipated heavy retirements during the first four years; but no reduction occurred, probably because of the litigation that followed the refunding.

See State vs. *Winter Haven*, 114 Fla. 199, 154 So. 799,

City of Winter Haven vs. *State*, 114 Fla. 527, 154 So. 879.

City of Winter Haven vs. *Eloise Groves Corp.* 114 Fla. 93, 153 So. 92,

City of Winter Haven vs. *Summerlin*, 114 Fla. 727, 154 So. 863, which was not settled until the decision of this Court in 1940.

Klemm & Sons vs. *City of Winter Haven*, 141 Fla. 60, 192 So. 652

So that the principal of the City's debt in 1940 was the same that it was in 1933. The bonds at that time were bearing interest at 5 percent; the rate would increase in 1943 to 6 percent on Series A and 5½ percent on Series B. In 1940, the City negotiated a new refunding contract (Ex. B p. 135 Tr.) which would permanently reduce interest on all of its bonds to 4 percent for the first maturing one-third of new refunding bonds, 4¼ percent for the second maturing one-third, and 4½ percent for the last maturing one-third and called its old bonds for payment April 1, 1943. Maturities of the new refunding bonds were to be arranged so that the maximum tax levy for any year would not exceed $126,000. The new bonds were to be exchanged for the 1933 bonds, but the agents agreed to purchase for cash, at par, enough bonds to redeem all bonds not exchanged within 18 months.

The bonds of 1933 and the Resolution authorizing their issue, (Sec. 11 pp. 72-4 Tr.) also provided that

> "All of said General Refunding bonds, Series A, shall be callable as hereinafter set out, upon any interest payment date, according to the following schedule: On or prior to April 1, 1943, at par, accrued interest at the rate then prevailing as enforcible and collectible, plus one half of the deferred interest for the period of ten years, such one-half of said deferred in-

terest being $72.50 on each $1,000. bond, or at the same rate on bonds of smaller denomination."

After 1943, plus $108.75 per $1,000. bond; after 1953, plus $145.00 per $1,000 bond.

A similar provision fixed the sum to be paid to the holders of Series B at $47.50 during the first ten years. The amount of the premium would increase in 1943 and again in 1953 as with Series A.

The following table shows in dollars and cents the result of giving effect to the provision of bonds of Series A if they were called during the first ten years:

If bonds were called	City would have paid interest coupons aggregating	Plus ½ of deferred and interest certificate	or A Total of
Apr. 1, 1934	$ 35.00	$72.50	$107.50
" " 1935	70.00	72.50	142.50
" " 1936	110.00	72.50	182.50
" " 1937	155.00	72.50	227.50
" " 1938	205.00	72.50	277.50
" " 1939	255.00	72.50	327.50
" " 1940	305.00	72.50	377.50
" " 1941	355.00	72.50	427.50
" " 1942	405.00	72.50	477.50
" " 1943	455.00	72.50	527.50

Series B differs only in that the additional amount was $47.50.

These amounts of $72.50 and $47.50 to be paid in addition to interest were premiums to be paid for redemption. Petitioners themselves say so (p. 4 of Petition).

The amount of these premiums was constant for the first ten years; increased at the end of the eleventh year and again at the end of the twentieth year. At maturity the deferred interest certificates would come due with the bonds.

This provision of the bonds is found only in Sec. 11 of the Resolution, which contains only the terms of call. Secs. 2 and 7 of the Resolution fix the rates of interest to be paid.

The sums to be paid in addition to interest cannot be regarded as interest on the bonds, otherwise the result would be incongruous. For example: The amount to be paid if the bonds of Series A were called at the end of the first year would, if added to the interest represented by coupons, have been the equivalent of interest at the rate of 10¾ percent, and the maximum rate of interest allowed by the law of Florida is 10 percent.

Sec. 687.04 Florida Statutes, 1941

Sec. 6872(6) C. G. L. 1927

The amount to be paid by the City if it called the bonds of Series A at the end of the second year (1935) would if added to the coupon rate have been the equivalent of interest at the rate of 7½ percent; at the end of the third year, 6½ percent. Stated differently, the total amount to be paid at the end of the first year would exceed 6 percent (the rate on the old bonds) by $47.50 per thousand; or $95,000. on Series A. Not until the fourth year would the premium plus the coupon interest be less than the interest on the old bonds.

$375,000. bonds were already past due, $227,000. additional would mature in the calendar year 1934. All of these were payable at par. The City thus agreed to pay $33,000. merely for the privilege of redeeming new bonds issued in exchange for these bonds otherwise redeemable at par.

Petitioners also say that if this Court deny their right

to collect this premium, they are then entitled to collect "the full amount of interest which would have been due to the holders of a like amount of indebtedness represented by the original bonds" (6 percent on Series A and 5½ percent on Series B) from 1933 to 1943 less the interest that has been paid by the City and represented by coupons that have matured, because of the provision of Sec. 20 of the Resolution, authorizing the bonds which was as follows:

> "That if any clause, section, paragraph or provision of this resolution or of the General Refunding Bonds hereby authorized be declared unenforcible by any Court of final jurisdiction, it shall not affect or invalidate any remainder thereof, and if any of the bonds hereby authorized be adjudged illegal or unenforcible in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment".

The following table shows what the City would now be required to pay on Series A under the claim of the full 6 percent from date of the bonds until April 1, 1943.

Interest already paid by City on matured coupons.

2 yrs.	@ 3½%	$ 70.00	
1 "	" 4%	40.00	
1 "	" 4½%	45.00	
6 "	" 5%	300.00	$455.00
Additional amount claimed by Plaintiffs			$145.00

This is twice the amount per bond Petitioners claim to be entitled to demand under the premium clause of the bonds. $72.50 per bond on Series A would amount to $145,000; $145.00 per bond would amount to $290,000. It is the amount which, according to the "deferred interest coupons", would not be due until the maturities of the bonds.

The City paid the "Agency" a fee of $35,100. for its services under the illegal contract. Petitioners' Ex. B (p. 86 Tr.) says that this amount "was added to the debt of the City". The Complaint does not negative this allegation of the Exhibit, and it must be assumed to be a fact. Its truth was admitted in the State Court, (p. 150 Tr.).

The Refunding Agents of the City were creditors of the City and represented creditors (See Ex. A, p. 119 Tr.). The Plan for refinancing was prepared by them. The "Refunding Agency" composed of "three or more substantial individual creditors" was given exclusive authority to act in carrying out the refinancing plan for a period of five years, and for such further time as necessary to complete it.

Control of the refunding by the Agency was assured by Sec. 14 of the Resolution (p. 132 Tr.). Caldwell & Raymond of New York City, or Chapman & Cutler of Chicago, both recognized as expert bond counsel, the City Attorney and a Florida counsel were to be employed *by the Agency*, which agreed to pay the fees of *all* counsel (including the City Attorney) and all expenses. The creditors thus demanded and received an unconditional surrender of the City and dictated the terms of peace.

QUESTIONS TO BE DECIDED

Argument of the case divides itself into consideration

First, of the effect to be given by Federal Courts to the decisions of the Florida Court in the *Andrews, Outlaw, Taylor* and *School District* cases (also *State* vs. *New Smyrna Beach*, 148 Fla. 482, 4 So. 2d. 660, decided since the case was instituted);

Second, the rights of Petitioners under Sec. 20 of the Resolution if the *Andrews* and others cases are the law of this Court.

First Question

A. *Andrews* vs. *Winter Haven*

The Florida Supreme Court in *Andrews* vs. *Winter Haven, etc.*, held unenforcible the agreement to pay a premium if the bonds are called. That question was posed by Plaintiffs in that case and the opinion of the Court answered it. The Court said

> "In answer to question one on authority of *Outman* vs. *Cone*, 141 Fla. 196, 192 So. 611 and *Taylor* vs. *Williams*, 142 Fla. 402, 195 So. 175; Id., 142 Fla. 562, 195 So. 184, we are impelled to hold the deferred interest coupons void and non-enforcible but that they may be severed from other provisions of the refunding bonds which may then be called under the terms of the contract."

It is unnecessary to discuss at length the amendment to the Complaint criticizing the proceedings in *Andrews* vs. *Winter Haven* (pp. 102-3). Petitioners carefully avoid alleging that the Florida Supreme Court knew of or was influenced by the facts alleged. They do not charge that the Court was a party to a "made case" or with bad faith. Nor is it necessary to cite authority to show that Petitioners' remedy to correct an unjust or collusive decree of the Florida Court is by a proceeding in the Florida Court, to have it correct its own error. This Court is not a Court to review errors of a State Court and this proceeding cannot be utilized as an Appeal from a decision of the Florida Court. This suit was brought in the Federal Court. A judgment of the Florida Court cannot be attacked in a Federal Court on the ground that it was not fairly and honestly rendered and is not State law, unless the judgment of the State Court violates the Federal constitution. There is no claim made here that a constitutional right has been violated.

Petitioners admit that even before the decision in the *Andrews* case, the Florida Court in *Outman*, *School District* and *Taylor* cases had decided the same question of law. In the *Andrews* case, therefore, the Circuit Judge, consistent with his duty could not have ruled otherwise than he did; nor could the Supreme Court itself have decided otherwise without reversing the precedents it had established. The good faith of those decisions and the judgment of the Florida Court has been reaffirmed by it in the *New Smyrna Beach* case, supra, decided since this suit was instituted. This Court should ignore the patent attempt to impliedly impugn the honesty and discretion of the Florida Court.

B. *Sullivan* vs. *Tampa was not Reversed by Outman* vs. *Cone or by Andrews* vs. *Winter Haven.*

Since the case of Petitioners rests upon the claim that the decisions in the *Andrews*, *Outman* and other cases have reversed the *Sullivan* case, our primary inquiry must be whether that claim has any foundation. We assert that *Andrews*, *Outman* and other cases not only did not reverse *Sullivan* vs. *Tampa*, but are consistent with that decision.

The bonds of Tampa were issued under Chap. 11855, Laws of 1927. The amendment to Sec. 6, Art. IX was adopted in 1930. *Sullivan* vs. *Tampa* was decided in 1931. The bonds in that case were to be sold, not exchanged; they carried no "deferred interest certificates"; contained no provisions for call or redemption or for the payment of a premium as a condition thereto. No void refunding contract existed and no fee had been paid to a fiscal agent. All the Court held was that since Sec. 6, Art. IX contained no express limitation on the rate of interest that refunding bonds "should bear", the Court would imply none. But in its opinion we find a statement that plainly indicated the construction the Court has ever since given to Sec. 6, Art. IX. It said:

> "It is quite probable that the difference between the amount which may be realized from the sale of the refunding bonds and the amount of the original obligations which are to be refunded *must be paid out of the general funds of the city, but if this is done it will not increase the bonded debt of the city.*"

The debt of the City cannot be increased by refunding without approval at an election.

Petitioners ignore that statement when they erroneously assert (p. 9 of Petition)

> "In that case (Outman vs. Cone, 141 Fla. 196, 192 So. 611) the Florida Court did what in the Sullivan case it had held it could not do, namely, it read into the constitutional amendment by implication, a provision to the effect that a refunding bond not authorized at a freeholder election must bear a lower rate of interest than the bond refunded."

The case did not so hold nor was that question ever raised. On the contrary, the *Outman* and other cases merely apply the principle implied in the quoted statement from *Sullivan vs. Tampa*. In *City of Miami* vs. *State*, 139 Fla. 598, 190 So. 774, the Court said that the City could not

> "directly, indirectly or in any way increase the bonded indebtedness";

In *Kathleen Citrus Land Co.* vs. *Lakeland*, 124 Fla. 659, 169 So. 356 it said that the Constitution prohibited new indebtedness which

> "in whole or in part, directly or indirectly presently or potentially"

would compel the levy of more taxes; in *State* vs. *Citrus Co.* 116 Fla. 676, 157 So. 4, (quoted by the Court from its opinion

in *Fahs* vs. *Kilgore*, 136 Fla. 701, 187 So. 170) it said that the

> "limitation of Sec. 6, Art. IX on the creation of new obligations is absolute",

and that the Court had applied that limitation,

> "to every form of proposed contractual device intended as a future obligation of the taxing power, directly or indirectly undertaken regardless of form."

All of these statements are consistent with the decision of the Florida Court in *Davis* vs. *Dixon*, 98 Fla. 87, 123 So. 536 in 1928 long before Sec. 6, Art. IX was amended. There the Court held that the

> "postulate of the general rule as to the issuance of refunding bonds without a new election is that such bonds merely evidence an extension of existing indebtedness."

(*Davis* vs. *Dixon*, supra, is quoted and followed in *Sullivan* vs. *Tampa*, supra).

This principle has been literally followed by the Court in determining the meaning of "refunding bonds" in the amendment to Sec. 6.

In *State* vs. *Citrus County*, supra, it said that authority to issue refunding bonds

> "is limited to a mere authorized extension of the old obligations of the contract to the new bonds when the latter purport to be issued exclusively for the purpose of refunding the old bonds or interest thereon."

Though the Court had held that obligations payable solely from revenues of a utility did not require an election, it held that if the city gave a mortgage on its utility as

additional security, the pledge was void, unless first approved at an election. *Boykin* vs. *River Junction*, 121 Fla. 902, 164 So. 558; *State* vs. *Melbourne*, 135 Fla. 870, 185 So. 850.

In *Brash* vs. *State Tuberculosis Board*, 124 Fla. 167, 167 So. 827; it first disapproved revenue bonds issued by that Board for the same reason. In 124 Fla. 652, 169 So. 218 it approved the bonds when that clause was eliminated.

In *State* vs. *Citrus County*, supra, and *Bay County* vs. *State*, 116 Fla. 656, 157 So. 1, additional revenue had been pledged to secure refunding bonds. The Court held that this could not be done without approval by the taxpayers at an election.

In *Pierce* vs. *Isaac*, 134 Fla. 666, 184 So. 663, it refused to permit the District to pay refunding expenses and fees out of sinking funds, because that would result in increasing the debt without an election.

In *Motes* vs. *Putnam County*, 143 Fla. 134, 196 So. 465, and *Suwannee County* vs. *State*, 147 Fla. 477, 2 So. (2d) 850, it held that the sinking fund must be used to pay bonds; that the amount of refunding bonds issued without an election could not exceed the amount of the outstanding debt less the amount in the sinking fund.

In *Miami* vs. *State*, supra, the Court drew the dividing line and directly contradicts the premise of Petitioners when it said that

> "duly authorized and legally reasonable expenses incurred in the process of refunding may be paid by the unit as a current expense; but the amount of no part of such expense should be directly or indirectly in any form or manner added to the bonded or continuing indebtedness of the unit unless it is duly approved by the vote required by Sec. 6, Art. IX of the Constitution as amended in 1930.

> The law does not contemplate that unmatured though callable bonds shall be refunded at large expense unless the tax burden pledged to pay the bonds shall thereby be materially lightened by postponing payments of principal, by substantial reduction in interest rates or otherwise be financially and economically beneficial in a substantial degree to the general welfare of the taxpayers and citizens of the particular governmental or taxing unit,"

and added

> "Nothing is permissible, whether statutory or otherwise that will directly, indirectly or in any way exceed the debt limit, or that will in any way increase the bonded indebtedness of the unit without the required electorate approval."

These statements are not only contrary to Petitioners' premise but are a mere repetition of *Sullivan* vs. *Tampa*.

In *State* vs. *Fort Myers*, 145 Fla. 135, 198 So. 814, the Court again drew the line when it validated refunding bonds because the city had not contracted to levy taxes to pay a fee to the fiscal agent *in addition to the principal and interest on the bonds*. The fee was paid out of surplus.

So in *Outman* vs. *Cone*, supra, the Court merely restated the "postulate" for the issue of refunding bonds without an election which it had announced in *Davis* vs. *Dixon*, supra, before the amendment was adopted.—that if anything more than an extension of the original obligation be attempted, the bonds must be approved by freeholders as required by Sec. 6, Art. IX. It did not refer to *Sullivan* vs. *Tampa* and did not reverse it. It held that the refunding bonds in the *Outman* case

> "disclose a material departure from the terms of the original bonds,"

because the provisions for payment of a portion of the "deferred interest certificates" in the event of call, *leave ground to jockey* the bond situation and impose an undue hardship on the taxpayer (who otherwise would have been entitled to vote) by exacting the amount claimed. (The table on p. 9 of this brief shows how the debt was "jockeyed"). It paves the way to violate Sec. 6, Art. IX by indirection.

> "The exact point of cleavage (that is between bonds that must be approved by freeholders and those that need not) appears to be whether or not the *amount of deferred interest must be* posted (that is, credited) in favor of the holder of the old bonds when they are called in the manner provided."

The bonds being then outstanding the Court did not hold them void, but held that the agreement to pay "deferred interest certificates" as a condition to call was not enforcible, was severable; and that the County could call the bonds at par plus accrued interest.

State vs. *Special Tax School District*, supra, cited the *Outman* case and said that

> "There is no authority for enforcing deferred interest coupons *if the outstanding bonds are called prior to October 1, 1942.*"

See also Taylor vs. *Williams*, supra.

It was not until after these decisions that Andrews filed his suit in the State Court against Winter Haven. The Court cited the *Outman* and *School District* decisions and again held that the "deferred interest coupons" were unenforcible, could be severed and that the bond

> "may then be called under the terms of contract."

But Winter Haven obligated itself to pay a portion of the "deferred interest certificate" as a premium for the redemption of its bonds before maturity. Petitioners themselves say so (Petition, p. 4). The earlier the call, the larger the premium to be paid. For the first three years the premium added to the interest would even exceed the interest on the old bonds at the original rates of 5½ percent and 6 percent.

The City also paid the bondholders or their representatives a fee of $35,100. and increased its indebtedness by that amount. It even obligated itself to pay a premium of over $30,000. for what Petitioners call "the privilege" of redeeming within one year bonds issued to refund bonds that were past due or that would mature in one year.

The opinion in *Miami* vs. *State*, supra, quoted (p. 17 of this brief) referring to *Sullivan* vs. *Tampa*, supra, which had been cited by the State said

> "The essential facts there (in the *Sullivan* case) were different (from those in *Miami*)."

It thereby drew the distinction which it had previously drawn. So here, the essential facts are different from those in the *Sullivan* case.

To those familiar with the debt problem of Florida municipalities, the decisions of the Florida Court are consistent in logic and result, and with the purpose of the amendment to Sec. 6, Art. IX. Any seeming inconsistency in phrascology becomes clear when we consider the facts of the cases. In all of them the Court gave effect to the purpose of the absolute limitation or prohibition of the amendment, against an

increase in debt without an election and at the same time preserved the privilege of the proviso in accord with the purposes of the amendment as it interpreted it in *Sullivan* vs. *Tampa*.

The Florida Court could have grounded its decisions in the *Oatman*, *Andrews* and other cases upon the express language of Chap. 15772, Laws of 1931. That Act was passed to make effective the proviso of Sec. 6, Art. IX adopted in 1930. It was passed at the first succeeding session, and is a legislative interpretation of the amendment. At the same session, provision was also made for holding elections when required by the amendment. Sec. 3 of Chap. 15772 granted the City authority to include in the refunding resolution an agreement to redeem the bonds at par as follows:

> "In the discretion of the governing body the right to redeem all or any of the bonds at par before maturity may be reserved upon terms and conditions to be fixed by resolution."

That Act did not contain authority for the city to pay a premium. Petitioners' bonds were issued under the authority of that Act. (see form of bond, p. 61 Tr.) The City, therefore, had no legal power to contract to pay any premium for the right to redeem.

Chap. 15772 did give the City power to include numerous provisions, but Petitioners misstate the Act when they say redemption could be on any terms fixed by the City.

We are not concerned here with the wisdom of this limitation upon the power of the City, nor with whether the agreement was a good business deal for the City. If we were,

the table would show the contrary. Every person dealing with the City took notice of the existence and terms of the law under which the power to issue bonds is claimed. That power was derived exclusively from legislative authority, and the laws which conferred that power entered into and formed a part of the bonds themselves as if included therein. A holder of bonds is charged with notice of the provisions of those laws. *Anthony* vs. *Jasper Co.* 101 U. S. 693, *Northern Bank* vs. *Porter* Twp. 110 U. S. 608; *State* vs. *St. Petersburg*, 144 So. 313, 106 Fla. 742, *Ogden* vs. *Daviess Co.* 102 U. S. 634.

On page 10 of their brief Petitioners say that the *Sullivan* case is inconsistent with *State* vs. *Sarasota* 118 Fla. 629, 159 So. 797, and that the Court in the latter case held that refunding bonds might be issued without an election providing for the payment of deferred interest to the full amount of the interest rate borne by the bonds being refunded as a consideration to the refunding bond takers for accepting a callable bond in lieu of original bond which was non-callable. But in that case the bond expressly reserved the right to call the same at par and accrued interest at the rate "then prevailing as enforcible and callable". Payment of the difference between the coupon rate of the refunding bond and the rate of the original bonds that were refunded was not to be made until maturity. The Court's opinion expressly pointed out that

> "the right of recoupment * * * * is contingent only. It cannot attach during any of the time that the bonds are subject to call before maturity, as these proposed refunding bonds are. * * * * Only in the event that none

> of these contingencies shall occur, is it to become an operative condition of the proposed refunding bonds that the reserve differential of 10% due on what would otherwise be a total loss in interest for the life of the bonds as between the old interest rate and the new shall, on October 1, 1957 * * * * become payable by recoupment for interest deferred and uncalled during the contract period."

Petitioners also say that the agreement of Winter Haven to pay a premium in the event of the call of the Winter Haven Bonds before maturity was rendered valid by the fact that the holders of the old bonds accepted new bonds carrying a temporary reduction in interest. But since the city had no power by law to contract to pay a premium for redemption, even the existence of a valuable consideration could not give validity to an agreement to pay a premium. Either the city had the power to contract to pay a premium or it did not. If it did not, the agreement is void.

On page 28 of their brief petitioners quote section 3 of Chap. 15772 under which these bonds were issued, but fail to give effect to the meaning of that clause. They have italicized the word "upon". They should have italicized the words "at par before maturity". The privilege of reserving the right to redeem is limited to redeeming bonds "at par before maturity". The granting of this power is therefore limited, and the City had no power to agree to pay more than par in the event it redeemed the bonds before maturity. A granting of power to public officers is construed as mandatory and not directory unless an intention to the contrary is indicated.

In *Howell* vs. *State*, 77 Fla. 119, 81 So. 287, the Florida Court held that permissive words

> "are peremptory when used to clothe a public officer with power to do an act which * * * * concerns the public interest, or the rights of third persons."

The general rule is found in Southerland which is referred to in the opinion, and also in Endlich on Interpretation of Statutes, Sec. 533 and 59 C. J. Secs. 631, 632, 633. This is not merely a technical distinction, but is necessary because of the provisions of Sec. 6, Art. IX. If the City could redeem its bonds at a price in excess of par as it might determine, the result would be to increase the indebtedness of the city automatically when the bonds were called at the premium despite the absolute prohibition of the amendment, for the premium would then "be posted" as the Court said in the *Outman* opinion, and would become a part of the obligation payable on the call.

The amount of the premium to be paid is not material; nor can the prohibition of the constitution be evaded by fixing the premium as a percent of a stated interest coupon rather than as a percent of par, or as a stated sum of money. The result is the same—an increase in debt. The Legislature so construed the amendment. The Florida Court in its opinions dealt with the amendment itself and its purpose, and gave it the same construction.

It says that it has condemned every plan for refunding that would have the effect of directly or indirectly producing the prohibited result.

The argument of Petitioners shows how the bondholders attempted to "jockey the debt" of the city to their advantage, thereby bringing the provisions of the bonds for payment of a premium within the exact language of the *Outman* case. The Florida Court has drawn the "line of cleavage" between bonds that may be issued without an election and those that may not. The Winter Haven bonds it holds could not have been issued without an election but, having been

issued, they are valid except for the provision which violates the policy of the State as fixed by the Court to prevent indirect violations of Sec. 6, Art. IX. The distinction is clear when the facts are understood and considered in connection with the intent and purpose of that amendment.

C. Gelpcke vs. *Dubuque*

Petitioners say that in *Gelpcke* vs. *Dubuque* this Court established a "principle" of law which the Florida Court has followed, and that later decisions of the Florida Court should be ignored in this case because they reverse *Sullivan* vs. *Tampa*. But *Gelpcke* vs. *Dubuque* did not announce a new principle; it is only a decision of that case. The only reason given by the Court for refusing to follow the later decision of the Iowa Court was that

> "the earlier Iowa cases (which were to the contrary) were sustained by reason and authority and were in harmony with the adjudication of sixteen states of the Union;"

that the later cases

> "can have no effect upon the past;"

because

> "where there is a change of judicial decision as to the constitutional power of the legislature it can have no effect upon the past."

But the opinion does not give any reason why the Federal Court could refuse to follow the decision of the State Court construing its own Constitution. It simply refused to follow it.

Justice Miller's dissenting opinion pointed out that the decision was contrary to the earlier decisions of this Court.

In other cases decided about the same time (cited in Petitioners' Brief p. 37) the Court simply said that the question had been decided in *Gelpcke* vs. *Dubuque*. But in *Pine Grove* vs. *Talcott*, 19 Wall 666 decided in 1874, the Court realized its inconsistency and gave as its reason for refusing to follow the rule of the State Court, that Sec. 10, Art. 1 of the Federal Constitution forbids a state from impairing the obligation of a contract by law and that

> "impairment could not be accomplished by judicial decision."

This statement was without precedent and has not been followed. The Court has always held the contrary in cases appealed to it from State Courts and later gave a different reason.

In *Central Land Co.* vs. *Laidley*, 159 U. S. 103 (decided 1895) it receded from its error in *Pine Grove* vs. *Talcott* and said that Gelpcke and other cases were decided under the rule of *Swift* vs. *Tyson*, 16 Pet. 1 State Court's decisions had not been followed because those cases had originated in Federal Courts and involved questions of "commercial" and "general law", which Federal Courts were free to decide. The Court expressly held that it *would not have had jurisdiction* if those cases had reached it by appeals from State Courts; it compared *Gelpcke* vs. *Dubuque* with *Miss. & Mo. RR* vs. *McClure* 10 Wall 511, an illustration of the difference between the two types of cases.

Great Southern Hotel Co. vs. *Jones*, 193 U. S. 532, affirmed *Central Land Co.* vs. *Laidley* and again stressed the fact that *Gelpcke* and other cases had originated in Federal Courts. In *Tidal Oil* vs. *Flanagan*, 263 U. S. 444, Taft C. J. segregated decisions involving this question into groups to show the Court had always been consistent. He said that this Court had refused to follow State Courts

because under *Swift* vs. *Tyson* it was free to decide according to rules of "general" or "commercial law", and added that

> "Certain unguarded language in Gelpcke and in some other cases had caused confusion although these cases did not really involve the contract impairment clause of the Constitution."

Petitioners themselves do not contend to the contrary.

Thus it appears that ever since the *Laidley* case this Court has been committed to the theory that the *Gelpcke* and other cases represent an extension of the rule of *Swift* vs. *Tyson*.

The *Gelpcke* case did say that reversal by a Court of an earlier decision could not affect the rights of persons who had relied upon the earlier one. It does not follow that this Court can reverse for that reason. On the contrary, this Court has always refused to review cases appealed from State Courts on that ground. In *Bacon* vs. *Texas*, 163 U. S. 207 it said that this Court has no jurisdiction, because a State Court changes its views in regard to the proper construction of its State statute, although the effect of such judgment may be to impair the value of what the State Court had before that held to be a valid contract, and again re-referred to *Mississippi & Missouri RR Co.* vs. *McClure*, supra.

In *Patterson* vs. *Colorado*, 205 U. S. 454, Justice Holmes said that

> "the grounds on which the Circuit Courts are held authorized to follow an earlier State decision rather than a later one, or to apply the rules of commercial law as understood by this Court rather than those laid down by the local tribunals, are not grounds of constitutional right but considerations of justice and expediency."

> "Even if it be true * * * that the Supreme Court of Colorado departed from earlier and well established precedents to meet the exigencies of the case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed." Such a decision by the State Court is not "an infraction of the XIV Amendment."

See also *Brinkerhoff-Faris Trust Co.* vs. *Hill*, 281 U. S. 673. *Greater Northern Railroad Co.* vs. *Sunburst Oil Co.*, 287 U. S. 358. *Klemm* vs. *Winter Haven*, 309 U. S. 638.

In *Bristow Battery* vs. *Rogers County*, 37 Fed. 2d. 504, a case very similar to this, the 10th Circuit Court of Appeals followed these cases. That suit was in the Federal Court and charged that the decision of the Oklahoma Court violated the 14th Amendment. The Court concluded,

> "In substance, the bill of complaint asks a Federal Court to review the rulings of the State Supreme Court in cases to which complainant was not a party, and to hold that the Supreme Court was in error. Such a contention does not present a Federal question. There was no power in the Federal Court below to enter upon the review."

This court refused to review that decision, 282 U. S. 843.

The same purpose lies behind the present complaint but with no facts to sustain the claim of reversal;—merely an argument of counsel, and an indirect implication that the Florida Court decided the case the way the parties wanted it decided.

If no power exists to review a decision of a State Court which has a retrospective effect and its decision cannot be reviewed by an attack in a Federal Court on the ground it violates the 14th Amendment, how can the Federal Court hold otherwise, except under the theory of *Swift* vs. *Tyson*?

In order to hold that *Gelpcke* is a precedent for this case, the Court must reverse its decisions in *Laidley, Great Northern, Tidal Oil* and numerous other cases. It must also reverse the Bacon, Patterson and other cases and follow *Swift* vs. *Tyson* and hold that it has jurisdiction to review decisions of State Courts in an appeal from them; otherwise there will be two rules of law, one applicable to suits between citizens of a state in State Courts and the other to suits between citizens of different States in Federal Courts.

D. *Erie* vs. *Tompkins has Reversed Swift* vs. *Tyson, and Reinstated the Rule Followed Prior Thereto.*

In the light of the foregoing discussion, *Gelpcke* vs. *Dubuque* must be regarded as an exercise of power under the rule of *Swift* vs. *Tyson*. It can no longer be regarded as a precedent; for *Erie* vs. *Tompkins*, supra, reinstated the rule that had been followed prior to *Swift* vs. *Tyson*. Decisions made shortly after the adoption of the Constitution and the passage of the Judiciary Act, by a court that included members of the Congress that enacted that law, disclose their understanding of the purpose of Sec. 34 and of the limitation there imposed on the power of Federal courts. Here are a few statements taken from the early opinions.

Polk vs. *Wendal*, 9 Cranch 87

"In cases depending upon the statute of a State and more especially in those regarding titles to land, this Court adopts the construction of the State where that construction is settled."

Thatcher vs. *Powell*, 6 Wheat 119

"In construing the acts of a legislature of a State the decisions of a state tribunal have always governed this Court."

Daly vs. *James*, 8 Wheat 535

"The opinions of State Courts will be as obligatory upon this Court as they would be accorded to be in their own Courts."

Elmendorff vs. *Taylor*, 10 Wheat 153

"The adoption by this Court of the construction of State law by a State Court is founded on the principle that is universally recognized; that the Judicial Department of every government is the appropriate organization for construing legislative acts of the government. No Court in the universe which professed to be governed by principle would presume to undertake to say that the Courts of Great Britain or of any other nation have misunderstood their own statutes. We feel ourselves no more at liberty to distinguish from that construction than to distinguish from the words of the statute. This Court ought to adopt the same rule should we even doubt its correctness."

Jackson vs. *Chew*, 12 Wheat 153

"A contrary doctrine would be repugnant to the principles which have always governed this Court and would present a conflict between State Courts and those of the United States productive of incalculable mischief."

Prior to *Green* vs. *Neal*, 6 Peters, 291, this Court had followed decisions of the North Carolina and Tennessee Supreme Courts in *Patton* vs. *Easton*, 1 Wh. 476 and *Powell* vs. *Harman*, 2 Peters 241. When the Tennessee Court reversed its decision, this Court held that the Federal Courts should do the same and that

"the same reason which influences this Court to adopt the construction given to the local law in the first instance is not less strong in favor of following it in

"the second if the State Court change their construction."

since this would have the effect of establishing two rules of property in the same state.

"The inquiry is, *what is the settled law of the State at the time the decision* (of the Federal Court) *is made?*

if there be two rules of property,

"the consequences are not only deeply injurious to the citizens of the State, but are calculated to engender the most lasting discontent."

On the other hand

"Adherence of Federal Courts to the construction of local law given by State Courts will greatly help to improve harmony in the exercise of State and Federal Judicial powers."

Livingston vs. *Moore*, 7 Peters, 469, 540

"* * the relation in which our circuit courts stand to the States in which they respectively sit and act is precisely that of their own courts, especially when adjudicating on cases where State lands or State statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them or deviate from them than could be correctly exercised by their own tribunals."

In all of these cases, it will be noted that emphasis was placed upon preserving the proper relation between Federal Courts and State Courts; upon maintaining and enforcing one system of law in both systems of courts—the law of the State. *Swift* vs. *Tyson*, supra, on the other hand

emphasized the fact that this Court is national, that this Court is Supreme and that its decision should be final. History has shown that State Courts have nevertheless continued to decide cases within their jurisdiction without regard to the fact that a different result would occur if they were tried in Federal Courts. Since no Federal question exists, they know their decisions are final.

The dissenting opinions of Judge Miller in the *Gelpcke* and in *Butz* vs. *Muscatine*, 8 Wall. 575, of Justice Fields in *B & O* vs. *Baugh*, 149 U. S. 368, of Justice Holmes in Kuhn vs. *Fairmont*, 215 U. S. 345, and *Black & White Taxicab* vs. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, criticized the rule of the *Swift* case and pointed out the evils it produced; they predicted its ultimate abandonment. The opinion of Justice Brandeis in the *Erie* case shows that their prophecies have been fulfilled for the reasons given.

E. *Under the Erie Case, this Court Must Follow the Law of Florida as Announced by Its Supreme Court.*

The Erie case held that Federal Courts should follow the law of Florida as construed by the Supreme Court of that State.

Under that rule Florida decisions, especially those construing the Constitution and laws of that State, must be accorded the same respect that the Florida Court accords the decisions of this Court in matters of Federal law or that this Court accords to decisions of English Courts in matters of English law. It must be presumed that the Florida Court knows its own constitution, statutes and decisions and the purpose and intent of them, and that its decisions are the law of Florida, binding upon Federal Courts.

As this Court said in *Green* vs. *Neal*, supra,

> "Apparent inconsistencies in the construction of the statute laws of the States (by State Courts) may be expected to arise."

but this does not justify disregarding them.

In *Wichita R. Co.* vs. *City Nat'l Bank*, 306 U. S. 103 this Court recently said:

> "Even if we thought this distinction made by the Texas Court), not well taken, nothing requires the State Court to be consistent in their decisions if they do not choose to be.".
>
> "State law is to be applied in the Federal as well as in the State Courts rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the State Court may have departed from prior decisions of the Federal Courts."

Swift vs. *Tyson*, supra, has been reversed. No decision that rests upon *Swift* vs. *Tyson*, supra, can now be regarded as an authoritative precedent for decisions of a Federal Court in cases resting solely on diverse citizenship.

In the *Erie* case Justice Brandeis said that

> "doctrine of *Swift* vs. *Tyson* is an unconstitutional assumption of power."

This Court since then has not referred to the Constitution, as authority, but it has held that *Erie* vs. *Tompkins*, supra, would have been the rule of decision if Sec. 34 of the Judiciary Act had not been passed, *Russell* vs. *Todd*, 309 U. S. 280; that the rule controls decisions in cases in equity as well as in cases at law; *Russell* vs. *Todd*, supra, *West* vs. *American T. & T.*, 311 U. S. 223; that it controls the decision of a suit for a declaratory judgment, *Stoner* vs. *New York Life*, 311 U. S. 464.

What we consider the true rule is embodied in the statements of the present Chief Justice in *Fidelity Union Trust*

Co. vs. *Field*, 311 U. S. 169, and former Chief Justice Hughes in *West* vs. *A. T. T.*, supra,

> "It is inadmissible that there should be one rule of State law for litigants in the State Courts and another rule for litigants who bring the same questions before Federal Courts owing to the circumstances of diversity of citizenship."

> "The obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a State of two divergent or conflicting systems of law, one to be applied in the State Courts, the other to be availed of in the Federal Courts, only in case of diversity of citizenship. That object would be thwarted if the Federal Courts were free to use their own rules of decision whenever the highest Court of the State has spoken."

It is true that this Court has not expressly said that *Gelpcke* vs. *Dubuque*, supra, has been reversed. It has not heretofore been necessary. But the statement of Justice Stone in the *Wichita* case (p. 33 this brief) and that of Justice Reed in the *Vandenbark* vs. *Owen, Ill. Glass Co.*, 311 U. S. 538 case imply this. The latter said:

> "While not insensible to possible complications, we are of the view that, until such time as a case is no longer sub judice, the duty rests upon Federal Courts to apply State law under the rules of decisions statute in accordance with *the then controlling decision of the highest State Court.*"

Justice Stone also said:

> "The highest Court of the State is the final arbiter of what is State law. When it has spoken, its pronouncement is to be accepted by Federal Courts as defining State law unless it has later given clear and persuasive

indication that its pronouncement will be modified, limited or restricted."

West vs. *American T and T Co.*, 311 U. S. 236.

Even the fact that a State Court's decision has a retrospective effect does not justify a departure from the rule of *Erie* vs. *Tompkins*. Justice Holmes, in his dissenting opinion in *Black & White*, supra, said that

"decisions having" retrospective operation have been made for "nearly a thousand years".

Reversals by this Court of its own decisions have been given retrospective effect. The *Legal Tender* cases are an example. Others could be given.

By way of finality the Court in *Russell* vs. *Todd*, supra, said:

"We are no longer free to apply a different rule".

Whether, therefore, the premise of the rule in *Erie* vs. *Tompkins* be that *Swift* vs. *Tyson*, supra, was an unconstitutional assumption of power by this Court or as indicated in its more recent decisions, a matter of national policy; the purpose of the Court is clear—to preserve our dual system of courts and the dual sovereignty recognized by the Federal Constitution; to have one rule of law applicable to citizens and non-citizens alike in both State and Federal Courts. There is no middle ground or "no-man's land" such as existed during the ascendancy of the theory that there was a common or general law superior to that of a State, for as Justice Brandeis held, "There is no common law of the United States." The Constitution created none. Except in England there was no uniform system of common law in 1789. English common law had been modified in the States and adapted to our system of government, to American ideals and institutions. The English common

law of 1790 limited individual rights in ways never recognized in America. In 1790 no two states had identical systems of common law, and the Constitutional convention could never, without violent debate, have agreed that either the English common law or the common law of any one state should be a uniform system of law in Federal Courts in cases based on diversity of citizenship. Yet the proceedings of the convention do not show that the subject was even discussed.

By their reference to the power of Federal Courts under the general provisions of Article III, petitioners imply that the Constitution gave Federal Courts power (sometimes called "inherent") to adopt their own system of law. The idea of an "inherent power" of Courts reminds us of the doctrine of the inherent "Right of Kings" except that its source is the Constitution and not Divinity. The Constitutional convention never intended to confer inherent or arbitrary power on any branch of our government. Nothing was further from their purpose. A judicial autarchy would have been as objectionable as a political one. The Constitution intended that "the people" should make their own laws. Federal Courts were given no power to legislate. Even the power of Congress to legislate was limited to specified subjects. The states remained supreme in other fields. If this Court had inherent power to adopt a system or rule of law, general or commercial, it could adopt the law of Holland or France, in whole or in part, and Congress would have no power to repeal it.

The first Congress had no doubt as to the meaning of Article III. It enacted the Judiciary Act at its First Session. Sec. 34 of that Act expressly required Federal Courts to follow the rules of decision of the State Courts. Every decision by this Court before *Swift* vs. *Tyson*, supra, did so in both common law and equity cases; in cases involving title to land, as well as in cases involving the construction

of State constitutions and statute; in matters of commercial law,—Judge Story to the contrary notwithstanding. So here, the State Court having decided a case identical with this, the Federal Court should follow that decision.

F. *No "Contract Exception" Recognized in Erie Case.*

Petitioners also say that the *Gelpcke* case is a "contract exception" to the general rule of *Erie* vs. *Tompkins*, supra. *Swift* vs. *Tyson*, supra, recognized an exception to Sec. 34 with results that caused this Court to reverse it, after an experience of one hundred years. There is no reason for it to make another exception. Sec. 34 of the Judiciary Act does not recognize one. Since this Court now holds that the rule of Sec. 34 would be the rule even if that Act had not been passed, it implies that there can be no exception. No decision of this Court rendered before *Swift* vs. *Tyson*, supra, recognized any exception other than cases involving Federal law. If there is to be any exception only this Court can determine what that exception shall be. Its experience under *Swift* vs. *Tyson*, supra, surely does not encourage it to again open this Pandora's box. If this Court's decision in *Swift* vs. *Tyson* was as the *Erie* case says, an "unconstitutional exercise of its power" it can make no exception. Recognition of an exception will result in a renewal of the former conflict between State and Federal Courts by recreating two systems of law in each state. If it be that this Court should have power to reverse decisions of State Courts because they are retrospective in matters of state law, that power should be exercised in appeals from State Courts; not in cases originating in Federal Courts that involve a collateral attack upon the decision of the State Court which has no opportunity to defend its decision. Only in that way could this Court control State Courts.

G. Florida Court Has Not Discriminated Against Non-Resident Bondholders.

The Florida Court has demonstrated that it does not discriminate against non-residents in bond suits; that it has not discriminated in favor of political subdivisions of the State.

Ever since *Columbia County* vs. *King*, 13 Fla. 451, decided in 1870, holders of Florida bonds have been accorded full protection. See *Klemm* vs. *Davenport*, 100 Fla. 627, 129 So. 904, *State* vs. *Cedar Key*, 122 Fla. 454, 165 So. 672, *State ex rel Buckwalter* vs. *Lakeland*, 112 Fla. 200, 150 So. 508, *Gray* vs. *Moss*, 115 Fla. 701, 156 So. 262, *Humphreys* vs. *State*, 108 Fla. 92, 145 So. 858, *State* vs. *Boring*, 121 Fla. 781, 164 So. 859, and a multitude of other cases.

Petitioners refer to the fact that *Columbia County* vs. *King*, supra, and other Florida cases have cited *Gelpcke* vs. *Dubuque*, supra, and say this is the law of Florida. But those cases merely announce a rule which the Florida Court applies to its own decisions. They do not hold that the Florida Court will never give its decision a retrospective effect. If they have any value here it is because they prove that the Florida Court has not reversed *Sullivan* vs. *Tampa*, supra. In *Columbia County* vs. *King*, supra, the Florida Court said that to reverse its earlier decision in *Cotten* vs. *Leon County*, 6 Fla. 610 holding the act under which the bonds were issued constitutional

> "would be an outrage upon public justice".

When to make its decisions retrospective, is for the Florida Court to decide, and when it has not clearly reversed itself, a reversal should not be presumed or implied.

By claiming that the Florida Court has reversed *Sullivan* vs. *Tampa*, Petitioners, without proof, accuse the Florida

Court of having done that which it said it would not do; with having perpetrated "an outrage on public justice". This Court cannot so hold without convicting the Florida Court of injustice; without holding that either through ignorance or deliberate bad faith it has done that which it has given no indication that it intended to do and which indirectly (in *Miami* vs. *State)* it has disclaimed any intention to do. Surely under these circumstances, this Court will affirmatively presume that the Florida Court is more familiar with the purposes of Sec. 6, Art. IX, of the State Constitution, with the intention of the State Legislature in proposing that amendment and in passing Chap. 15772, with the circumstances existing in the cities and counties of that State, than is this Court; that it is better able to determine the probable effect of its decisions upon other situations arising in cities, other than Winter Haven, as well as in counties, districts, etc., which are faced with similar problems. Any doubt (such as that expressed by the Court of Appeals) as to its decision should be resolved in favor of its good faith since it cannot even appear here to answer the charges implied by Petitioners. This Court must assume that the Florida Supreme Court fully appreciated its responsibility, unless its own opinions prove the contrary. In *Gelpcke* and other cases, the State Court's opinions showed on their face an intention to change the law, to reverse former decisions holding the statutes constitutional; but neither in the *Outman, Andrews* or any other case is there an indication of an intention to reverse or even be inconsistent with the decision in *Sullivan* vs. *Tampa.*

H. *No Reliance Alleged in Pleadings.*

But even if this Court were disposed to recognize an exception to *Erie* vs. *Tompkins*, supra, in cases where parties have entered into a contract in reliance upon law announced

by the State Supreme Court prior to the date of a contract, and even if the Florida decisions be considered a reversal of *Sullivan* vs. *Tampa*, the decree of the District Court should be affirmed. Petitioners do not claim that they relied upon *Sullian* vs. *Tampa*, supra; only their counsel makes that claim. There is not even an implication of that fact in the pleadings. The Complaint does not allege

(a) that Petitioners had heard of *Sullivan* vs. *Tampa*, supra, much less that they had construed it as authority for the contract or relied upon it, or

(b) that they were advised by counsel that their contract was valid and that their counsel relied upon that opinion; or

(c) that they surrendered old bonds and accepted the 1933 bonds in exchange therefor, relying upon *Sullivan* vs. *Tampa*, supra, or

(d) that they acquired the bonds they now hold, before the Florida Court in the *Taylor*, *Oatman* or *Andrews* cases had decided that the provisions of its bonds were unenforcible.

These obvious omissions should effectually dispose of counsel's argument. Neither counsel's brief nor the Petition for the writ can take the place of allegations in pleadings of the parties. The wording of the Complaint is so patently evasive as to imply that Petitioners could not make these allegations. Under all rules of procedure, pleadings are construed against the pleader; the Federal rules should be so construed. If Petitioners did not rely upon *Sullivan* vs. *Tampa*, they cannot invoke the "principle of reliance" on which they rest their case. There should be some showing that they did rely other than the fact that the *Sullivan* case was decided in 1931 and their bonds are dated 1933. These Petitioners may not have acquired their bonds until after the Florida Court had decided contrary to their present contention. There is nothing in the Complaint to nega-

tive that fact. The repeated assertions of counsel do not supply the necessary allegations.

Second Question

But Petitioners say that if this Court must, under the decisions of the Florida Supreme Court, deny their first prayer on the ground that the provisions of the bond agreeing to pay a premium in the event of call are unenforcible, they are entitled to a judgment declaring that the City should pay them interest from the date of their bonds at the rate of the original bonds which were exchanged for refunding bonds, because of the provisions of Sec. 20 of the resolution authorizing their issue.

The Complaint merely alleges that Petitioners are

> "*entitled* to all the rights and privileges of bearers and holders of the obligations (that is, the old bonds) surrendered in exchange for general refunding bonds."

It does not allege why, nor what those rights are; but, in their brief, Petitioners say that they are entitled to 6 percent on bonds of Series A and 5½ percent on bonds of Series B, since their issue in 1933. Petitioners do not say when the difference between these rates and the interest already paid by the city on the refunding bonds should be paid. Their vagueness is probably due to the fact that they realize that the bonds and the resolution expressly provide that this difference shall be "enforcible and collectible" only at the *maturity* of the bonds. The first maturity is in 1948, the last in 1963.

If Petitioners had openly claimed that the City should be required to pay this $300,000, now, the inconsistency of that claim with the express terms of the bonds would have been apparent. But their prayer for an injunction (p. 25 Tr.) if granted, would have that effect.

Thus they ask this Court to rewrite the express provisions of the bonds and the resolution, (quoted on pp. . . . . and . . . . of this brief) and accelerate payment of these sums from five to twenty-five years, if the provision for payment of a premium in the event of call be held unenforcible. They have not asked the Court to enjoin a call of the bonds until they mature, because under the Complaint, as now framed, the City would be required to pay the bondholders *now*, $145. per $1,000 bond of Series A, and $95. per $1,000. bond of Series B, (a total of $300,000) instead of $72.50 and $47.50 which Petitioners say they had expected to receive if the bonds were called before April 1, 1943.

This alternative prayer purports to be based on equitable considerations. It was intended to create an impression in the mind of the Court that Petitioners would otherwise suffer a loss which they should be allowed to recoup. Judge Sibley of the Court of Appeals was misled thereby. He said that Petitioners should under Sec. 20 be able to collect what they would otherwise "lose" as a result of the Florida Court's decision. Whether he meant $72.50 or $145. per bond is not clear. But Judge Sibley entirely overlooked the fact that the Complaint does not allege that Petitioners would suffer a loss. It merely alleges (Par. 7(a)) that the bonds which Petitioners own "were issued in exchange for and upon the surrender and cancellation of original securities", but it does not allege that Petitioners *owned* and surrendered the original securities or that the bonds they now own were *issued to them* by the City in exchange therefor.

Sec. 7(d) alleges that Petitioners "are entitled to all the rights and privileges of bearers or holders" of the original bonds surrendered but not original bonds *which Petitioners surrendered*. There is not even an intimation that Petitioners would suffer a loss. Obviously the reason for this omission is that Petitioners did not own original bonds, and did

not surrender them in exchange for their present bonds; else they would have so alleged. They must have purchased new refunding bonds after they had been issued in exchange for original bonds. Since Petitioners do not allege that they will suffer a loss the Court cannot assume that they will, much less can it grant an injunction to prevent a loss.

It is even conceivable, and not improbable, that Petitioners may have purchased these refunding bonds after the Florida Supreme Court decided the *Outman* case or even after it decided the *Andrews* case. In that event, Petitioners would be charged with knowledge of those decisions and would have no right to the relief they seek. Their failure to allege how they acquired their bonds, when they acquired them, that in purchasing they relied upon the provision of Sec. 20; their failure to allege loss, as well as the evasive allegation that the bonds having been issued in exchange for old bonds, they are entitled to all rights of former holders,—all show that this case is an effort to enforce the letter of Sec. 20 upon a pure legal conclusion and not as Judge Sibley thought upon a claim for equitable treatment. Giving Petitioners the benefit of every allegation in the complaint they do not state a case which would justify a court of equity declaring they are entitled to relief.

But if we assume that the Court may infer that Petitioners acquired their present bonds from the city in exchange for original bonds formerly owned by them, other facts in the record are such as to require the Court to deny relief.

Petitioners admit that the refunding bonds were not sold, that they were exchanged for old bonds, and that the exchange was made pursuant to a contract of the City with R. E. Crummer and George W. Simons. That contract violated public policy of the State of Florida, and the resolution of which Sec. 20 is a part, having been passed for the purpose of carrying out that illegal contract, cannot

be separated from it. Petitioners having acquired their their bonds under the illegal contract cannot separate themselves from the illegality of it without alleging facts to show that the transactions were not connected.

The Resolution (p. 50 Tr.) attached to the Complaint recites and ratifies the contract and the creation of the Agency in accordance therewith. Sec. 17 of the Resolution (p. 81 Tr.) orders the bonds placed in escrow to be delivered "under the sponsorship and direction" of the Agency "pursuant to and as contemplated by the agreement heretofore entered into" with it on May 16, 1933.

The provisions of the contract are substantially similar to those of another contract which R. E. Crummer & Co. made with Lake County. It provided generally for turning over to the creditors or to an "Agency" composed of "three substantial creditors" complete control of the duties of the city officials for a period of five years at the expense of the City. Even the legal adviser of the city and the attorneys who were to approve the refunding bonds became employees of the bondholders agency. The Florida Court condemned the contract between R. E. Crummer & Company and Lake County in *Taylor* vs. *Williams*, supra, and *Howey* vs. *Williams*, 142 Fla. 415, 195 So. 181. It said

> "that all official authority, duties and functions shall be exercised and performed by duly commissioned officers; the delegation of official authority, duties or functions by officials is not permitted by the laws of this state."
>
> "Statutes authorizing the County Commissioners to issue bonds and refunding bonds for the county, etc. require official action in the issue of bonds and in all matters pertaining thereto which are functions or duties involving discretion and fiduciary attention to conserve the best interests of the county, its taxpayers and citizens."

"The law does not contemplate or permit the appointment of a foreign corporation representing the holders of a substantial portion of the outstanding bonds as fiscal agent for the counties or district in managing or controlling any of the official functions involved in the issuing of refunding bonds."

"The refunding resolutions and contracts are not in accord with law. The contract made for refunding bonds is held to be not within the laws of Florida."

Another contract, similar in effect, was held void by the Tenth Circuit Court of Appeals in *City of Vero Beach* vs. *Rittenoure Inv. Co.*, 113 Fed. (2d) 269. The Fifth Circuit Court of Appeals held void still another contract, similar in effect, in *Bradford County* vs. *Nuveen*, 133 Fed. (2d) 169, because the contract was contrary to public policy of the State; it held there could not even be a recovery on a quantum meruit for services rendered. A similar Agency contract between R. E. Crummer & Company and the City of Avon Park was involved in *American United Insurance Co.* vs. *Avon Park*, 311 U. S. 138.

In this case the Agency has already received payment of a fee of $35,100. for its services under the illegal contract. In *Taylor* vs. *Williams*, 142 Fla. 756, 196 So. 214, the Florida Court held that fees paid under such a contract could be recovered at the instance of a taxpayer.

Under these decisions there can be no doubt of the illegality of the contract between the City and Crummer and Simons. That contract cannot be made the basis for a right of action against the City; on the contrary it can be made the basis for an action by a taxpayer against the Agency to recover the money illegally paid to it or them. Ordinarily, an illegal sale of bonds gives a holder no title. In this case, because the contract had been executed, the Florida Court held that the bonds were not void in toto, since the agreement to pay a premium for redemption was unenforcible

and could be severed from the contract. Sec. 20 of the Resolution itself provided

> "That if any clause, section, paragraph or provision of this resolution or of the General Refunding Bonds hereby authorized be declared unenforcible by any Court of final jurisdiction, it shall not affect or invalidate any remainder thereof."

The Court held that the city could call its bonds by paying par plus accrued interest. This the city is now attempting to do.

If Petitioners acquired title to their bonds under the illegal contract, and since the resolution upon which they rely was passed to make that illegal contract effective, neither Sec. 20 nor the resolution can be made the basis of a claim by Petitioners against the City. The contract to which the resolution relates being illegal, no Court will lend its assistance towards carrying out its terms, nor to enforce any alleged rights springing from the resolution and connected with the contract. *Stewart* vs. *Stearns*, 56 Fla. 570, 48 So. 19; *Finley Method* vs. *Standard Asphalt*, 104 Fla. 126, 139 So. 795. It is not necessary here to determine whether Petitioners could maintain this action without proving the illegal contract, since the Petitioners themselves filed the illegal contract as an exhibit (p. 119 Tr.) to their Complaint and the resolution—a section of which is the basis for their case—refers to that contract and expressly says that it was passed to make the contract effective and directs that the bonds be issued in accordance therewith. To permit recovery under Sec. 20 would in effect be to ignore the violation of public policy involved in the contract, would put a premium on its execution and would give to these holders who took advantage of that contract twice as much money as they would receive had the call provision

of the bonds been enforcible at law. Petitioners cannot select for enforcement one part of the resolution, even if it were legal, and separate it from the other portions or from the illegal contract with which it is indissolubly connected. The contract and the resolution were both parts of the same transaction. They cannot waive the illegal contract, directly or by an alternative prayer in order to enforce a section of the resolution. See *Hall* vs. *Coppell*, 7 Wall. 542.

The illegality of the refunding contract permeates the entire transaction if Petitioners bonds were acquired under it.

Here we point to the fact that the Complaint does not allege facts to show that Petitioners are separated from the illegal transaction. There is no negation of their knowledge of the contract and there are no affirmative allegations that their bonds were purchased from others in good faith and for a valuable consideration.

> "If an agreement grows immediately out of or is connected with an illegal or immoral act or agreement, a Court cannot lend its aid to enforce it though it is in fact a new agreement. If the connection between an original illegal transaction and a new promise can be traced, if the latter is connected with, and grows out of, the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery." 12 Am. Jur. Sec. 210, p. 717.

Only if the course of action of Petitioners is disconnected from the illegal act, founded upon a new consideration and they not obliged to resort to the illegal agreement can an action be maintained. 12 Amer. Jur. Sec. 211, p. 718. See cases cited in Note 1 including U. S. cases.

There was no new or separate consideration for the resolution or for Sec. 20. The only consideration that could

support it was the acceptance of refunding bonds by holders of original bonds through the Agency which had the illegal contract and controlled the disposition of the refunding bonds. The city itself had no power to waive the illegal provisions of the bonds. Public policy would prohibit its attempt to waive illegality.

Continental Wallpaper Co. vs. Louis Voight & Sons, 212 U. S. 227
McMullen vs. Hoffman, 174 U. S. 639
Hall vs. Coppell, 7 Wall. U. S. 542

If the city cannot waive illegality of the provisions of the bonds or of the refunding contract, it cannot by resolution contract to waive it. It probably could not have so contracted, even if it had been given authority so to do by the Legislature. But neither the City Charter nor Chap. 15772, Acts of 1931, Chap. 132, Florida Statutes 1941, purports to confer such authority upon the city, much less does either grant to the city authority to subject itself to a liability for twice as much as the illegal provision of the bonds purported to impose. The broad powers given to the City by Chap. 15772 do not militate against this position but tend to emphasize the accuracy of the foregoing statement because that Act omitted authority for such an agreement.

There is not a single statement in any decision by the Florida Court that can be construed as implying possible liability under the resolution. In every decision there will be found statements that negative any possibility of it. The Florida Court expressly said that the bonds "can be called at par plus accrued interest." Was it necessary for the Court to add that it meant that the City could not be made to pay more than that? Was it necessary to negative the possibility that liability of the City under Sec. 20 had not been determined in order for its decision to be clear?

The entire refunding plan was illegal; the creditors obtained control of the affairs of the City which was helpless to oppose their wishes; they jockeyed the debt of the city for their own advantage through the medium of the illegal contract by which the city officials agreed to surrender their powers as duly constituted officers of the city to the control of adverse interests and to pay them for the exercise of that control. No Agency composed of bondholders could fairly represent the interests of the taxpayers.

Petitioners rely (p. 48 of brief) upon *Jefferson County vs. Hawkins*, 23 Fla. 223, 2 So. 362,—a case in no sense parallel. In that case the issue was single. The county being legally indebted on bonds, without statutory authority issued refunding bonds which creditors accepted. The Court held that the county was without authority to issue the refunding bonds. Hence the original bonds had not been paid. Holders of refunding bonds were allowed to recover the debt evidenced by the original bonds. The only question was whether the bondholders could recover all their money or none. There was no illegal contract, no unconstitutional provision in the refunding bonds or resolution. The Florida Court has held repeatedly that a quantum meruit count at law is "likened to a bill in equity" which can be proved by any evidence

> "showing that the defendant has possession of the money of the plaintiff which, in equity and good conscience, he ought to pay over."

Cullen vs. S. F. L. Ry. Co., 63 Fla. 422, 58 So. 182; *St. Johns Electric Co. vs. St. Augustine*, 81 Fla. 588, 88 So. 387; *Brevard County B & L Ass'n. vs. Sumrall*, 101 Fla. 1189, 133 So. 888. Applying this principle, the Court granted a judgment. The facts in this case negative the possibility of applying that rule here.

CONCLUSION

The majority of the Circuit Court of Appeals held that this case should be dismissed without prejudice to the right of Petitioners to seek relief in the State Court, because the State law is not clear. We submit that the State Court has already settled every question of law raised by the Bill except the question of whether Federal Courts should follow their decisions. This they could not settle. The validity of the agreement to pay a premium has been held void. The refunding contract has been held void and contrary to public policy of the State. The Florida Court has held that the holders of refunding bonds are entitled to be paid the principal of their debt with interest at the coupon rate, and the City offers to pay it. The Florida Court has also held affirmatively that the City can call its bonds at par plus accrued interest at the coupon rate to date of call. This is the law of Florida and it is clear and settled.

The Circuit Court of Appeals should have affirmed the decision of the District Court. Petitioners have rested their alternative prayer upon Sec. 20 of the resolution and upon the fact that they hold refunding bonds, notwithstanding the fact that their pleadings show the illegal contract under which the bonds were issued, and that they seek twice as much money under this prayer of the Complaint as they do in their claim on the bonds. They have failed to allege that they would suffer any loss of interest if their claim be denied, and have allowed final decree to be entered without attempting to amend further.

The decisions of the Florida Supreme Court in the *Andrews* case as well as in the *Outman, New Smyrna* and other cases, are the law of Florida and are conclusive in this Court that Petitioners have no right to a declaratory decree under their first prayer.

The alternative prayer must be denied because Sec. 20 cannot be separated from the illegal contract of the City with the Agency. The bondholders prepared the contract. The City had no alternative. Petitioners either acquired their bonds under that illegal contract or they acquired them in the open market after the bonds had been issued. The bill fails to show that Petitioners are bona fide holders for a valuable consideration unconnected with the original transaction. The Complaint does not allege that they will suffer a loss. The decree of the Circuit Court of Appeals should be reversed and that of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1943.

W. J. Meredith, James G. Martin and A. R. Ohmart, Petitioners, *vs.* The City of Winter Haven. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 8, 1943]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioners sought a judgment granting equitable relief in the District Court below, whose jurisdiction rested solely on diversity of citizenship. The question is whether the Circuit Court of Appeals, on appeal from the judgment of the District Court, rightly declined to exercise its jurisdiction on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty.

Petitioners brought this suit in the District Court for Southern Florida, alleging by their bill of complaint that they are owners and holders of General Refunding Bonds issued in 1933 by respondent, the City of Winter Haven, Florida; that by their terms the bonds are callable by the city on any interest date on tender of their principal amount and accrued interest, including a specified amount (depending on the date of call) of the interest payable upon the deferred-interest coupons attached to the bonds; that the city is about to call and retire the bonds without providing for payment of the deferred-interest coupons. The bill of complaint prayed a declaration that this could not lawfully be done and an injunction restraining the city from doing it.

In the event that the court should determine that the obligation of the deferred-interest coupons is unenforceable, then it was prayed that the court declare that petitioners are entitled to enforce the obligation for payment, principal and interest, of the amount of the original bonded indebtedness of the city which was refunded by the General Refunding Bonds now held by petitioners, and that the court enjoin the city and its officials,

respondents here, from failing or refusing to pay the interest due on such refunded bonds, as provided by the resolution of the city commissioners authorizing the issue and sale of the General Refunding Bonds in 1933.

The District Court granted respondents' motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the questions of law involved had been determined adversely to petitioners by the Supreme Court of Florida. The Court of Appeals, without passing on the merits, reversed and directed that the cause be dismissed without prejudice to petitioners' right to proceed in the state courts to secure a determination of the questions of state law involved. 134 F. 2d 202.

The Court of Appeals agreed with petitioners that the bill of complaint presented a justiciable controversy requiring determination, that they were entitled to a judgment declaring the law of Florida with respect to the validity of the deferred interest coupons, and that if petitioners' contentions were sustained they were entitled to a declaration in their favor and an injunction implementing the declaration. But upon an examination of the Florida decisions the court concluded that the applicable law of Florida was not clearly settled and stable, but was quite the contrary, citing *Sullivan* v. *Tampa*, 101 Fla. 298; *Columbia County Commissioners* v. *King*, 13 Fla. 451; *State ex rel. Nuveen* v. *Greer*, 88 Fla. 249; *Humphreys* v. *State ex rel. Palm Beach Co.*, 108 Fla. 92; *Alta-Cliff Co.* v. *Spurway*, 113 Fla. 633; *Lee* v. *Bond-Howell Lumber Co.*, 123 Fla. 202; and *Andrews* v. *The City of Winter Haven*, 148 Fla. 144. It expressed doubt as to what the Florida law, applicable to the facts presented, now is or will be declared to be, and in view of this uncertainty, since no federal question was presented and the jurisdiction was invoked solely on grounds of diversity of citizenship, it thought that petitioners should be required to proceed in the state courts.

Although the opinion below refers to the suit as one for a declaratory judgment, the declaration of rights prayed, as is usually the case in suits for an injunction, is an indispensable prerequisite to the award of one or the other of the forms of equitable relief which petitioners seek in the alternative. Hence so far as we are concerned with the necessity and propriety of a determination by a federal court of questions of state law, the

case does not differ from an ordinary equity suit in which, both before and since *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, federal courts have been called upon to decide state questions in order to render a judgment.

The facts as presented by the amended bill of complaint and the motion to dismiss raise two issues of state law, one and possibly both of which must be decided if petitioners are to have the benefit which they seek of the jurisdiction conferred on district courts in diversity cases. The first question arises from the fact that the Refunding Bonds of 1933 were issued without a referendum to the freehold voters of the city. Article IX, § 6 of the Florida constitution provides that municipalities "shall have power to issue bonds only after the same shall have been approved by the majority of the votes cast in an election", in which a majority of the freeholders of the municipality shall participate, but dispenses with this requirement in the case of "refunding" bonds. The question is whether, under the applicable decisions of the Florida courts, the provision for deferred-interest coupons could rightly be included in the obligation of the Refunding Bonds of 1933 without a referendum. If it be decided that the provision could not be included and that the coupons are invalid, the second question is whether petitioners, as holders of refunding bonds, are entitled, under § 20 of the resolution of the city commissioners authorizing the Refunding Bond issue,[1] to recover the principal and interest of an equivalent amount of the bonds refunded. This question, unlike the first, so far as appears, has not been passed upon by the Florida courts.

Several decisions of the Supreme Court of Florida have declared that where bonds to be refunded contain no provision for deferred-interest coupons, refunding bonds containing such coupons would impose "new and additional or more burdensome terms" [*Outman* v. *Conc*, 141 Fla. 196, 199] which may not be included in refunding bonds unless they are approved by referendum in accordance with Article IX, § 6. *Outman* v. *Conc*,

[1] "Section 20. That if any clause, section, paragraph or provision of this resolution or of the General Refunding Bonds hereby authorized be declared unenforcible by any Court of final jurisdiction, it shall not affect or invalidate any remainder thereof, and if any of the bonds hereby authorized be adjudged illegal or unenforcible in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment."

supra; Taylor v. *Williams*, 142 Fla. 402; *Andrews* v. *The City of Winter Haven, supra.*

As appears from the amended bill of complaint, after the present suit was begun the Supreme Court of Florida decided the case of *Andrews* v. *The City of Winter Haven, supra.* This case involved the same issue of Refunding Bonds as are here in question. The Florida court held that the deferred interest coupons are invalid; that the purported obligation of the invalid coupons is severable from the obligations to pay the principal of the bonds and current interest on the other coupons, which obligations are valid and enforceable; and that the bonds are subject to call upon tender of the stipulated principal and interest without including any amount purporting to be payable on the deferred-interest coupons.

It is the contention of petitioners that the *Andrews* case is not controlling because it, as well as *Outman* v. *Cone, supra*, and *Taylor* v. *Williams, supra*, which it cited and followed, is inconsistent with earlier decisions of the Supreme Court of Florida antedating the Refunding Bonds of 1933, particularly *Sullivan* v. *City of Tampa, supra; State* v. *City of Miami*, 103 Fla. 54; *State* v. *Special Tax School District No. 5 of Dade County, Fla.*, 107 Fla. 93; *Bay County* v. *State*, 116 Fla. 656; *State* v. *Citrus County*, 116 Fla. 676; *State* v. *Sarasota County*, 118 Fla. 629. Petitioners also insist that, in deciding the *Andrews* case, the attention of the Supreme Court of Florida was not directed to the doctrine which it had earlier announced in *Columbia County Commissioners* v. *King, supra*, and in *State ex rel. Nuveen* v. *Greer, supra*, that by the law of Florida a contract is governed by the laws declared at the time the contract was made, and that consequently the court did not apply the doctrine. And finally it is said that the weight of the *Outman* and *Andrews* cases as precedents is impaired by the fact that although they appear on the record to be adversary litigations they were not in fact vigorously contested.

While the rulings of the Supreme Court of Florida in the *Andrews* case must be taken as controlling here unless it can be said with some assurance that the Florida Supreme Court will not follow them in the future, see *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 107; *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, 177-178; *West* v. *American Tel. and Tel. Co.*,

311 U. S. 223, 236, we assume, as the Court of Appeals has indicated, that the Supreme Court of the State may modify or even set them aside in future decisions. But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. *Commonwealth T. Co.* v. *Bradford*, 297 U. S. 613, 618; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 387; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234-235; *McClellan* v. *Carland*, 217 U. S. 268, 281-282. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. *Beal* v. *Missouri Pacific R. R. Co.*, 312 U. S. 45, 50. Exercise of that discretion by those, as well as by other courts having equity powers, may require them to withhold their relief in furtherance of a recognized, defined public policy. *DiGiovanni* v. *Camden Insurance Ass'n*, 296 U. S. 64, 73, and cases cited. It is for this reason that a federal court having jurisdiction of the cause may decline to interfere with state criminal prosecutions except when moved by most urgent considerations; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Beal* v.

Missouri Pacific R. R. Co., supra, 49-51; *Douglas* v. *City of Jeannette*, 319 U. S. 157; or with the collection of state taxes or with the fiscal affairs of the state, *Matthews* v. *Rodgers*, 284 U. S. 521; *Stratton* v. *St. Louis, S. W. Ry. Co.*, 284 U. S. 530; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293; or with the state administrative function of prescribing the local rates of public utilities, *Central Kentucky Co.* v. *Railroad Commission*, 290 U. S. 264, 271 *et seq.* and cases cited; or to interfere, by appointing a receiver, with the liquidation of an insolvent state bank by a state administrative officer, where there is no contention that the interests of creditors and stockholders will not be adequately protected. *Pennsylvania* v. *Williams*, 294 U. S. 176; *Gordon* v. *Ominsky*, 294 U. S. 186; *Gordon* v. *Washington*, 295 U. S. 30; cf. *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, 381. Similarly it may refuse to appraise or shape domestic policy of the state governing its administrative agencies. *Railroad Commission* v. *Rowan & Nichols Co.*, 311 U. S. 570; *Burford* v. *Sun Oil Co.*, 319 U. S. 315. And it may of course decline to exercise the equity jurisdiction conferred on it as a federal court when the plaintiff fails to establish a cause of action. *Cavanaugh* v. *Looney*, 248 U. S. 453; *Gilchrist* v. *Interborough Company*, 279 U. S. 159. So too a federal court, adhering to the salutary policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478. It is the court's duty to do so when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action. *Chicago* v. *Fieldcrest Dairy*, 316 U. S. 168. In thus declining to exercise their jurisdiction to enforce rights arising under state laws, federal courts are following the same principles which traditionally have moved them, because of like considerations of policy, to refuse to give an extraordinary remedy for the protection of federal rights. *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 359-361; see *Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 551-552 and cases cited; cf. *Securities and Exchange Comm.* v. *United States Realty Co.*, 310 U. S. 434, 455 *et seq.*

But none of these considerations, nor any similar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.

Erie v. *Tompkins*, *supra*, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. *Wichita Royalty Co.* v. *City National Bank*, *supra*; *West* v. *American Tel. & Tel. Co.*, *supra*, 236-237; *Fidelity Trust Co.* v. *Field*, *supra*, 177-180; *Six Companies* v. *Joint Highway District*, 311 U. S. 180, 188; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Palmer* v. *Hoffman*, 318 U. S. 109, 116-118. Even though our decisions could not finally

settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication.

The judgment will be reversed and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

Reversed.

Mr. Justice BLACK and Mr. Justice JACKSON are of the opinion that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 134 F. 2d 202.

A true copy.

Test:

Clerk, Supreme Court, U. S.